

37-1990(1)

Supreme Court, U.S.

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JOSEPH F. SPANOL, JR.

No. _____

IN THE

Supreme Court of the United States
OCTOBER TERM, 1987

—
RICHARD F. BODDIE,

Petitioner,

v.

DANIEL G. FAISON, *et al.*,

Respondents.

—
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals' modification of a jury verdict, which awarded different amounts of damages against several defendants, so as to impose joint and several liability on all defendants for the largest single damage award, violates the Seventh Amendment and this Court's decision in *Dimick v. Schiedt*, 293 U.S. 474 (1935).

PARTIES TO THE PROCEEDING

The petitioner is Richard F. Boddie, who at the time of the transaction at issue in this case was a 27-year-old, second-year associate attorney at a law firm in Falls Church, Virginia.

The respondents are Daniel G. Faision and LaShavio Faision, homeowners in the District of Columbia.

There were five other defendants in the proceedings in the trial court who have had no involvement in the appellate consideration of this case. Those defendants were Nationwide Mortgage Corporation, Norman C. Tillette, Joseph Hayman, Walter L. Waters and David Brandt.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner Richard F. Boddie respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on October 30, 1987 and as modified on rehearing on March 4, 1988.

OPINION BELOW

The full opinion of the court below, reported at 839 F.2d 680 (D.C. Cir. 1987), is reproduced in the Appendix hereto, at 1a-26a. The March 4, 1988 order and memorandum opinion of the court below granting in part and denying in part rehearing, also reported at 839 F.2d 680, is also reproduced in the Appendix, at 27a-30a. The judgment of the trial court, entered on July 29, 1985, is also reproduced in the Appendix, at 31a-34a.

JURISDICTION

The judgment of the court below was entered on October 30, 1987. Petitioner timely filed a petition for rehearing which was granted in part and denied in part on March 4, 1988. This petition for a writ of certiorari was filed June 2, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides, in pertinent part:

In Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Title 28 of the United States Code, § 2106 (1982), provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Federal Rules of Evidence, Rule 404, provides, in pertinent part:

(b) **Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

In 1984, respondents Daniel and LaShavio Faison filed an action in the United States District Court for the District of Columbia pursuant to that court's diversity jurisdiction. 28 U.S.C. § 1332 (1982). The Faisons' action sought damages from six defendants, including petitioner Boddie, based on allegations of common law fraud, negligence and violations of the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.* (1981), in connection with a one-year \$14,000 second trust loan made to the Faisons by defendant Nationwide Mortgage Corporation on July 13, 1982. The loan was secured by a second deed of trust on the Faisons' residence in the District of Columbia.¹ When the Faisons defaulted on the note in July 1983, the noteholder foreclosed on the deed of trust and sold the property to a third-party.

The defendants included a lending company and its principal, two mortgage brokers, an investor in prom-

¹ All defendants were named in the fraud count; all but Mr. Boddie were named in the consumer protection count; and only Mr. Boddie was named in the negligence count, styled legal malpractice in the complaint.

issory notes and Mr. Boddie, an attorney. The Faisons claimed that the several defendants defrauded them by failing to inform them of material terms of the loan, misrepresenting the availability of long term financing, and fraudulently inducing them to represent that the loan was for a business purpose, rather than a consumer loan, thereby losing the protections of the Federal Truth-in-Lending Act. 15 U.S.C. § 1601 *et seq.* (1982).

Mr. Boddie was the attorney who settled the loan on behalf of defendant Nationwide. The loan settlement was tape recorded with the knowledge of Mr. and Mrs. Faison. The transcript of that recording and testimony at trial showed that Mr. Boddie explained each of the loan documents to the Faisons and that Mr. Faison stated that he intended to use the proceeds of the loan for a business purpose, as confirmed by several sworn affidavits he executed at settlement. However, Mr. Faison testified at trial that he had been "rehearsed" to state during settlement that the loan was for a business purpose and that in fact there was no business purpose for the loan proceeds. Mr. Faison also alleged he had been misled by the loan brokers concerning the terms of the loan and by the lending company concerning both the "business purpose" nature of the loan and the possibility of refinancing the loan when it came due at the end of the one-year term. Mr. Faison leveled similar allegations at the investor who later purchased the promissory note at a discount.

In addition to the testimony from witnesses actually involved in the Faison loan settlement, the trial court, over repeated objections, permitted plaintiffs to call three witnesses regarding prior Nationwide loans as

“prior bad acts” evidence under Rule 404(b) of the Federal Rules of Evidence. These three witnesses had received loans from Nationwide prior to the Faisons, had defaulted on their loans and subsequently sued Nationwide and others raising allegations similar to the Faisons. However, none of these witnesses testified regarding Mr. Boddie and there was no evidence which showed that Mr. Boddie had conducted any of these prior loan transactions.²

After the completion of all testimony, the trial court submitted the case to the jury on a special verdict form which allowed the jury, if it found liability, to enter a separate amount of compensatory damages against each defendant. After deliberation, the jury returned a verdict on July 16, 1985 finding each defendant separately liable for fraud and assessing \$5,000 in compensatory damages against Mr. Boddie, \$100,000 in compensatory damages against defaulting defendants Nationwide Mortgage Corporation and Norman Tillette and a total of \$5,100 in compensatory damages against the other three defendants. *See* Judgment of the trial court, reproduced in the Appendix at 31a-34a. Following the trial court’s denial of post-trial motions, Mr. Boddie filed an appeal in the United States Court of Appeals for the District of Columbia Circuit on October 16, 1985 and the Faisons then filed a cross-appeal on October 29, 1985.

The Court of Appeals decision, issued on October 30, 1987, affirmed the liability verdict against Mr.

² The court compounded this error by refusing to allow Mr. Boddie to rebut this testimony by presenting the testimony of witnesses concerning similar loan transactions in which Mr. Boddie was the actual settlement attorney.

Boddie and directed the district court to enter a judgment of \$100,000 in compensatory damages jointly and severally against all defendants. App., 26a. In reaching this surprising conclusion, the Court of Appeals determined that, pursuant to District of Columbia law, plaintiffs had suffered a single principal injury—the loss of their home. App., 14a. This single injury, according to the Court's opinion, required that compensatory damages be awarded jointly and severally against all defendants found liable for contributing to that single principal injury. App., 15a. However, the Court also recognized that the jury's allocation of separate and differing amounts of compensatory damages on the fraud claim was inconsistent with a finding of joint liability. App., 12a. Because the trial court had failed to instruct the jury on the consequences of finding multiple defendants liable for a single injury, the Court of Appeals realized that it could not draw any conclusions as to the true intent of the jury's findings. App., 14a.

Although faced with an erroneous verdict and uncertain as to what the jury would have done if differently instructed, the Court nevertheless refused to grant a new trial and instead articulated a novel rule which effectively increased Mr. Boddie's jury-determined liability from \$5,000 to \$100,000. App., 15a. The Court ruled that: "in actions against joint tortfeasors where the jury has erroneously apportioned damages, without stating an aggregate amount, apportionment of damages should be omitted, and the verdict directed against all defendants for the largest sum found against any defendant." *Id.* As authority for this result, the Court cited 28 U.S.C. § 2106 (1982), four state court decisions, the most recent of

which was 30-years-old, and an A.L.R. Annotation. App., 14a-15a.³

Concerning Mr. Boddie's appeal of the liability verdict, the Court ruled that the "prior bad acts" evidence had been erroneously admitted but still affirmed the verdict "because none of the alleged [evidentiary] discrepancies is clearly prejudicial." App., 17a. In examining the "prior bad acts" evidence introduced against Mr. Boddie, the Court found that: "[t]he evidence evinced from the other pattern witnesses was arguably not probative of Boddie's liability for fraud in this case and, even if marginally relevant on that issue, was almost surely more prejudicial than probative; therefore, its admission violated Rule 403." App., 18a. The Court then held, however, that because there was "substantial evidence" properly before the jury of Boddie's alleged participation in the fraud charged, the erroneously admitted and prejudicial evidence on the "prior bad acts" did not have a "sufficient impact" at trial to render the verdict "inconsistent with substantial justice." *Id.*

Mr. Boddie timely petitioned the Court of Appeals for rehearing, arguing that the Court's failure to grant a new trial after finding an erroneous verdict improperly invaded the jury's role as the sole factfinder, in violation of the Seventh Amendment, and conflicted with established precedent in the District of Columbia

³ *Goines v. Pennsylvania R.R. Co.*, 160 N.Y.S.2d 39 (1957); *Kinsey v. William Spencer & Son Corp.*, 300 N.Y.S. 391 (1937), *aff'd mem.*, 8 N.Y.S.2d 529 (1938), *aff'd mem.*, 281 N.Y. 601 (1939); *Curtis v. San Pedro Transp. Co.*, 52 P.2d 528 (Cal. App. 1935); *G.A. Baker & Co. v. Polygraphic Co. of America*, 193 N.E. 265 (N.Y. 1934); Annotation, 46 A.L.R.3d 801 (1972 & Supp. 1987).

and other federal Courts of Appeal. In addition, Mr. Boddie pointed out that there was no evidence in the record to support a compensatory damage award of \$100,000 and that a new trial should address both liability and damages because the issues of liability and damages were inextricably intertwined. On March 4, 1988, the Court granted Mr. Boddie's request for rehearing on the issue of lack of evidence to support the \$100,000 compensatory damage figure and denied it on all other grounds. App., 30a. On rehearing, the Court remanded the case to the trial court for an evaluation of a motion for new trial or remittitur. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION VIOLATES THE SEVENTH AMENDMENT, PRIOR DECISIONS OF THIS COURT AND DISTRICT OF COLUMBIA LAW.

The Court of Appeals decision, which disregards the jury's findings reached in special interrogatories and which imposes joint and several liability on an individual defendant for the largest amount of damages awarded against any of several defendants, is in direct conflict with the Constitution and a prior decision of this Court. U.S. Const. amend. VII; *Dimick v. Schiedt*, 293 U.S. 474 (1935). As such, the decision below establishes a dangerous precedent which warrants review by this Court. By invading the jury's constitutionally mandated role as factfinder, in contravention of the provisions of the Seventh Amendment, the Court of Appeals decision creates a new and unsuitable role for federal appellate courts.

Furthermore, federal courts in the District of Columbia in diversity cases are bound to follow District

of Columbia Court of Appeals precedents. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Pernell v. Southall Realty*, 416 U.S. 363 (1974). The decision below, however, conflicts with prior District of Columbia law which, in similar circumstances, mandates a new trial for an improperly apportioned verdict. *Greet v. Otis Elevator Co.*, 187 A.2d 896 (D.C. 1963). Petitioner respectfully requests that the Court grant the petition for a writ of certiorari to address these special and important issues raised by the Court of Appeals decision.

A. The Lower Court's Resolution of the Inconsistent Special Verdict Violates the Seventh Amendment as Applied by This Court and the Other Circuit Courts in Similar Cases.

In its opinion, the Court of Appeals concluded that the jury's special verdict on the fraud claim was legally inconsistent and erroneous in that, for what the lower court deemed a single injury, the jury both declared all defendants liable and imposed compensatory damages in differing amounts. App., 14a. The Court, citing *Greet v. Otis Elevator Co.*, 187 A.2d 896, 898 (D.C. 1963), also recognized that it could not resolve this inconsistency because it was a matter of conjecture what the jury intended. *Id.* The Court, while acknowledging that a new trial was called for, then ruled that it could, instead, impose joint and several liability on all defendants for the largest amount of damages awarded against any individual defendant. App., 15a.

This alteration of petitioner's liability for damages from \$5,000 to \$100,000 directly violates the Seventh Amendment right to jury trial. U.S. Const. amend. VII. Under the Seventh Amendment, federal courts

are without power to increase a jury's verdict. *Dimick v. Schiedt*, 293 U.S. 474 (1935). In *Dimick*, this Court stated:

Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages.

Id. at 486. And:

[W]here the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.

Id.

In this case, the Court of Appeals' reassessment and increase of the jury's factual determination of disputed liability and damages imposes an involuntary additur upon the petitioner. This action is completely contrary to Seventh Amendment constraints upon federal court power as interpreted by *Dimick* and as consistently applied, until now, by the circuit courts of appeal. See, e.g., *Roy v. Employers Mutual Casualty Co.*, 368 F.2d 902, 904 (5th Cir. 1966) ("[U]nder the Seventh Amendment a federal court is without power to add to an inadequate verdict"); *Ohio Valley Bank v. Greenebaum Sons Bank & Trust Co.*, 11 F.2d 87 (4th Cir. 1926) (Seventh Amendment precluded court from ignoring the apportionment of damages between the defendants by the jury and substituting judgment against both defendants jointly for the ag-

gregate amount of the damages awarded); *see also* *Hawkes v. Ayers*, 537 F.2d 836, 837 (5th Cir. 1976); *Novak v. Gramm*, 469 F.2d 430 (8th Cir. 1972); *DePinto v. Provident Security Life Insurance Co.*, 323 F.2d 826, 837-38 (9th Cir. 1963).

The courts have repeatedly enforced these Seventh Amendment principles by holding that an inconsistent special verdict requires a new trial. *See, e.g., Aquachem Co. v. Olin Corp.*, 699 F.2d 516, 521 (11th Cir. 1983); *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351 (5th Cir. 1980); *Ohio Valley Bank v. Greenebaum Sons Bank & Trust Co.*, 11 F.2d 87 (4th Cir. 1926). Contrary to these precedents in other circuits and to the mandate of the Seventh Amendment, the Court of Appeals in this case articulated a rule which allows an appellate court to ignore the Seventh Amendment and, instead, impose an amount of compensatory damages against a defendant which the jury never considered or awarded. The Court in this case adopted this result even in the face of its own admission that it was mere "conjecture" as to what the jury intended where it found liability on the part of all defendants for what the Court held was a single injury and yet also found those same defendants liable for differing amounts of damages. App., 14a. It would be difficult to find a clearer example of an appellate court substituting its judgment on the facts for that of the jury. Thus, affirming this precedent would transform federal Courts of Appeal into *de novo* factfinders, a role to which they are unsuited as well as forbidden by the Seventh Amendment and federal civil procedure. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-76 (1985); Fed. R. Civ. P. 52(a).

Furthermore, enforcement of this decision in the federal courts in the District of Columbia, at least, would create ongoing uncertainty for defendants appealing verdicts involving special interrogatories and place them at the mercy of a newly created Court of Appeals' discretion to modify and increase that defendant's jury-determined liability.

The only proper procedure, pursuant to the Constitution and prior judicial practice, where a jury verdict is inconsistent or erroneous, is to order a new trial. *Dimick v. Schiedt*, 293 U.S. 474 (1935). Furthermore, a new trial must address all issues because a new trial on part of the issues "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). In cases such as this, where it is held that a special verdict form has misled or confused the jury or inaccurately framed the issues to be resolved by the jury, a new trial will be ordered. See *Cann v. Ford Motor Co.*, 658 F.2d 54, 58-59 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982) and cases cited therein.

In the presentation of this case at trial, liability and damages issues were inextricably intertwined. "Where, . . . the issues of liability and damages were tried together and there are indications that the jury may have rendered a compromise verdict, the court should grant a new trial on all of the issues rather than one limited solely to the issue of damages." *Lucas v. American Manufacturing Co.*, 630 F.2d 291, 294 (5th Cir. 1980).

By granting the petition for a writ of certiorari, overturning the Court of Appeals' ruling and ordering a new trial, this Court can ensure that procedures for resolving inconsistent or inconclusive jury verdicts in federal courts are clearly and uniformly applied in accordance with the Seventh Amendment, and can correct the manifest injustice done to petitioner in this case.

B. The Court of Appeals Decision Conflicts With the Result Mandated in a Prior Decision of the District of Columbia Court of Appeals.

The lower court adopted the rule of law imposing joint and several liability on all defendants for the largest amount of damages awarded against any single defendant even though a prior District of Columbia Court of Appeals decision had, in similar circumstances, ordered a new trial. *Greet v. Otis Elevator Co.*, 187 A.2d 896 (D.C. 1963). In *Greet*, the plaintiff sued an elevator company and a building owner for injuries she received when she was negligently struck by an elevator door. 187 A.2d at 897. Although there was but a single injury, the jury returned separate verdicts against each defendant. *Id.* On appeal, the plaintiffs contended that judgment should have been entered against both defendants for the total amount of the individual awards. 187 A.2d at 898.

On these facts, the District of Columbia Court of Appeals held that when a jury improperly apportions a damage award for a single injury, "[i]t is a matter of conjecture whether the jury, if properly instructed, would have returned a verdict for the full amount against either defendant." *Id.* The court then ruled that the improper apportionment was an additional

ground requiring reversal of the lower court's decision and sent the case back to the trial court for a new trial. *Id.*⁴ The result reached by the Court of Appeals in this case is thus directly contrary to the law of the District of Columbia as articulated by its highest court in *Greet*.

C. Several Other Grounds Support Review by This Court of the Court of Appeals Decision.

Upon review by this Court, petitioner intends to raise several other grounds which warrant reversal of the Court of Appeals decision. First, the decision relies on an erroneous and unduly expansive reading of the federal statute allowing federal appellate courts to modify lower court judgments. 28 U.S.C. § 2106 (1982).⁵

The Court of Appeals cited this federal statute as authority for its power to increase petitioner's liability from \$5,000 to \$100,000. App., 14a. However, the Court of Appeals' reliance on this statute to increase

⁴ The result would be the same under Maryland law, *see Polkes & Goldberg Insurance, Inc. v. General Insurance Company of America*, 60 Md. App. 162, 481 A.2d 808 (1984) (appellate court may not increase the amount of a jury's verdict unless the jury's intent is beyond doubt, clearly and definitely manifested), which is persuasive in the District of Columbia absent a clear ruling on an issue by District of Columbia courts. *Dennis v. Walker*, 284 F. Supp. 413, 416 (D.D.C. 1968); *In re Parnell's Estate*, 275 F. Supp. 609 (D.D.C. 1967).

⁵ "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

a jury's determination of damages is unprecedented. While in rare cases federal appellate courts have relied upon Section 2106 to increase damages awarded in *non-jury* cases, *cf. Felder v. United States*, 543 F.2d 657, 671 (9th Cir. 1976), the federal courts have uniformly interpreted this statute as providing the authority only to *reduce* the amount or severity of a judgment in cases involving a *jury* verdict. *See, e.g., United States v. Whitlock*, 663 F.2d 1094 (D.C. Cir. 1980); *Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953). Thus, a federal court is prohibited from increasing the amount of an otherwise insufficient jury verdict. *Cf. Traylor v. United States*, 396 F.2d 837, 840 n.4 (6th Cir. 1968). The reason is clear. The Seventh Amendment forbids such an increase and 28 U.S.C. § 2106 cannot be read to permit what the Constitution proscribes. Allowing the Court of Appeals decision in this case to stand would open 28 U.S.C. § 2106 to an entirely new interpretation and create a power in federal appellate courts where none existed before.

Second, on review, petitioner would demonstrate that the cases relied on by the Court of Appeals as authority for its decision, all from state courts, cannot support the result reached here because the Seventh Amendment does not apply to trials in state courts. *See Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 217 (1916). Thus, the Court of Appeals decision is unsupported by, and is in direct conflict with, the only applicable case law, that from federal and District of Columbia courts.

II. THE LOWER COURT'S FAILURE TO FIND PREJUDICE IN THE ERRONEOUS ADMISSION OF 'PRIOR BAD ACTS' EVIDENCE CONFLICTS WITH PRIOR PRACTICE IN SIMILAR CASES.

The Court of Appeals also disregarded prior judicial practice in its resolution of petitioner's appeal concerning the liability verdict. On appeal, Mr. Boddie demonstrated that the trial court had improperly admitted evidence of prior loan transactions in which he was not involved, in violation of Fed. R. Evid. 404(b). The Court of Appeals agreed that such evidence should have been excluded at trial because such evidence was "not probative of Boddie's liability for fraud in this case and . . . was almost surely more prejudicial than probative." App., 18a. Nevertheless, the Court affirmed the liability verdict by finding that, though prejudicial, such evidence "did not have a sufficient impact at trial" to render the verdict improper. *Id.* This holding conflicts with prior circuit court rulings on the same issue and results in a departure from the accepted and usual course of judicial proceedings in similar circumstances. Accordingly, this Court should grant Mr. Boddie's petition for a writ of certiorari in order to review the lower court's unprecedented ruling on the liability verdict, as well as damages.

In *United States v. Hernandez*, 780 F.2d 113 (D.C. Cir. 1986), the court found that the admission of such "prior bad acts" evidence "overwhelmed" its probative effect and that it was reversible error which tainted the defendant's conviction. 780 F.2d at 118. Other federal courts have reached the same conclusion in the face of the improper admission of such prejudicial "prior bad acts" testimony when there is no

evidence of the defendant's participation in those prior acts. *See, e.g., United States v. Lightle*, 728 F.2d 468 (10th Cir.), *cert. denied*, 469 U.S. 823 (1984); *United States v. Angelilli*, 660 F.2d 23 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); *United States v. DeCicco*, 435 F.2d 478 (2d Cir. 1970). In *DeCicco*, the court articulated the rule that "prior similar acts . . . cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct." 435 F.2d at 483. In *DeCicco*, the testimony was held to be so prejudicial that even cautionary instructions were not enough. *Id.*

Therefore, these prior decisions have uniformly held that the erroneous admission of prior bad acts evidence, absent a showing that the defendant was involved in those acts, required reversal of the verdict and remand for new trial. *See also, Lataille v. Ponte*, 754 F.2d 33 (1st Cir. 1985); *United States v. Figueroa*, 618 F.2d 934, 944 (2d Cir. 1980) (court found that it was "inconceivable" that the "prior bad acts" evidence did not play some significant part in the decision of at least some of the jurors and ordered a new trial); *Reyes v. Missouri Pacific Railway Co.*, 589 F.2d 791, 795 (5th Cir. 1979) (where the erroneously admitted character evidence relates to one of the critical issues in the case, its harmful effect is "especially compelling" because such evidence is "extremely prejudicial").

The lower court in this case, faced with similar circumstances and after concluding that the evidence was prejudicial to Mr. Boddie's defense, nevertheless refused to find that the admission was reversible error. Instead, the Court held that, because there was "ample independent evidence in the record to impli-

cate Boddie in the specific transaction that is at issue," the prejudicial effect of the "prior bad acts" testimony was "much less clear" and was insufficient to overturn the verdict. App., 19a.

However, this result ignores a critical factor: absent the prior bad acts testimony, the plaintiffs' case against Mr. Boddie was extremely close and did not contain the clear and convincing evidence necessary to support a fraud verdict in the District of Columbia. *Bennett v. Kiggins*, 377 A.2d 57 (D.C. 1977), *cert. denied*, 434 U.S. 1034 (1978). In *Hernandez*, the court also reasoned that, absent the improperly admitted prior acts evidence, the case against the defendant was "quite close," 780 F.2d at 119, and that the improper evidence was therefore prejudicial. *Id.* The same court reached a similar conclusion in the appeal of a civil action for damages pursuant to 42 U.S.C. § 1983 (1982). *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986). There, the court held that, where character evidence was important to a central issue in the case, even valid limiting instructions by the court were ineffective to insulate the verdict because of the "grave danger of unfair prejudice" from this type of evidence, and ordered a new trial. 795 F.2d at 131.

As in *Hernandez* and *Carter*, the enhancement of the plaintiffs' claim in this case through its reliance on inadmissible evidence necessarily prejudiced the verdict in a case which was not only close, but required a higher standard of proof ("clear and convincing evidence") than an ordinary civil case. The Court of Appeals' resolution of this issue therefore resulted in a far and unacceptable departure from

prior judicial practice, which merits review and reversal by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6045

DANIEL GORDON FAISON, *et al.*

v.

NATIONWIDE MORTGAGE CORPORATION, *et al.*

RICHARD F. BODDIE,
FDBA—RUTTENBERG, PHELPS & SLOCUM
DBA—PHELPS, SLOCUM & BODDIE,

Appellant.

No. 85-6105

DANIEL GORDON FAISON, *et al.*,

Appellants,

v.

NATIONWIDE MORTGAGE CORPORATION, *et al.*

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 84-00312)

Argued October 30, 1986

Decided October 30, 1987

James L. Blair for appellees/cross-appellants Faison, et al.

John H. Spellman, with whom *Robert F. Reklaitis* and *Robert P. Fletcher* were on the brief, for appellant/cross-appellee Richard F. Boddie.

Before MIKVA and BUCKLEY, *Circuit Judges*, and JAMES B. PARSONS,* *U.S. Senior District Judge* for the Northern District of Illinois.

Opinion for the court filed by *Circuit Judge BUCKLEY*.

BUCKLEY, Circuit Judge: These two cross-appeals stem from special verdict awards in favor of plaintiffs Daniel and LaShavio Faiston, who claim they lost their Washington, D.C. home as a result of a fraudulent loan scheme. Although the jury was fully instructed on the matter of the joint and several liability of joint venturers, the special verdict form provided the jury precluded an explicit finding of joint and several liability. As a consequence, the compensatory and punitive damages awarded on the claim of fraud were individually apportioned among six defendants. The principal issue before us is whether, as a matter of District of Columbia law, the defendants should have been found jointly and severally liable on the fraud claim. We conclude that as that claim involved a single injury, the defendants are jointly and severally liable for the compensatory damages, but are individually liable for the punitive damages.

I. BACKGROUND

The Faisons' loan, which was ostensibly taken for "business" purposes, was arranged through defendant Norman Tillette, president of Nationwide Mortgage Corporation ("Nationwide"), and four other defendants—Walter Waters and Joseph Hayman who were brokers for the loan, Richard Boddie who acted as settlement attorney, and David Brandt who financed the loan by purchasing the Faisons' promissory note from Nationwide.

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

At the time of the trial, Daniel Faison was a 36-year-old District of Columbia firefighter. Sometime during the first half of 1982, he discussed his need for a loan with Waters, who was a fellow firefighter. Shortly thereafter, Waters referred Faison to Hayman, who represented that he knew people who could lend him money. Faison testified that he told both Waters and Hayman that he needed the loan to refurbish his home in Washington, D.C. Waters testified that Faison told him that he wanted to money to convert his basement into a rental apartment unit. The question of whether the loan was intended for business purposes pervades the trial record.

In June 1982, with the help of Waters and Hayman, Faison completed a Nationwide loan application for a second trust deed in the amount of \$14,000. On July 13, 1982, Faison, accompanied by his estranged wife LaShavio, went to settlement on the loan. Settlement took place in the law offices of Ruttenberg, Phelps & Slocum in Falls Church, Virginia. Among those present were Hayman, Tillette, and Boddie, who at the time was an associate of the law firm.

Boddie tape recorded the loan settlement and placed a transcript of that recording in the record. According to the transcript, Daniel Faison's first statement at the settlement was that he intended to use the proceeds of the loan to convert the basement of his house into a rental unit. Boddie subsequently reviewed numerous documents with Mr. and Mrs. Faison, including the settlement sheet, the promissory note, the deed of trust, affidavits concerning the purpose of the loan, and two title documents. Boddie explained each of the charges listed on the settlement sheet, expressly stating that they totalled \$5,752.40, leaving net proceeds from the \$14,000 loan of \$8,247.60.

Boddie made it clear that because the loan was for business purposes, it was not subject to consumer protection laws, including the Federal Truth in Lending Act. He

also pointed out that the loan was a one-year interest only balloon loan, with \$210 due monthly and the principal due after twelve months, and that a foreclosure might occur if the Faisons were delinquent in their payments.

The Faisons defaulted on the loan in August 1983 and Brandt, who had purchased the promissory note from Nationwide, invoked the foreclosure provisions of the deed of trust. Boddie represented Brandt in the foreclosure proceedings. The Faisons consequently lost their home and brought suit alleging fraud, violation of the District of Columbia Consumer Protection Procedures Act, D.C. Code Ann. §§ 28-3901 to -3908 (1981 & Supp. 1987), and legal malpractice.

At trial the Faisons claimed that all of the business purpose statements and affidavits at the settlement had been staged by Messrs. Tillette, Hayman, and Boddie; that the tape recording had been manipulated to support that fiction; that throughout the loan application proceedings Daniel Faison had made clear his intention to use the proceeds of the loan for non-business purposes; and that he proceeded with the loan only because Hayman and others had on numerous occasions assured him that the loan would be refinanced before the balloon payment became due.

Defendants Nationwide and Tillette did not respond, and a default judgment was entered against them. The lawsuit against the other four defendants, namely Boddie, Brandt, Hayman, and Waters, proceeded to trial. The first claim was for fraud and misrepresentation. Plaintiffs alleged that each of the defendants made affirmative statements and/or material misstatements or omissions that were not in accord with the facts regarding essential terms of the promissory note and deed of trust. In particular, plaintiffs allege that

Nationwide and its agents failed to disclose material facts to Plaintiffs *prior to settlement* on the

loan. Said Defendant failed to disclose the principal of the loan; that fees would be charged for a "discount" to Nationwide and for a "broker's fee" to Hayman and/or Waters; that the principal would be due in a balloon payment; that Nationwide, prior to settlement, had arranged with Brandt to have Brandt lend Nationwide the money for the loan, and that no long term refinancing was available.

Complaint ¶ 25(a) (emphasis in original). Plaintiffs further alleged that

- (b) Defendants Nationwide, Tillette, Hayman and Boddie misrepresented and failed to disclose material facts to Plaintiffs at the *time of settlement*: the true interest rate of the loan; Nationwide's discounting arrangement; Hayman-Waters' brokerage arrangement; the unavailability of long term financing; the significance of designating the loan "a business purpose" loan; and Nationwide's automatic assignment relationship with Brandt.
- (c) Defendants Nationwide and Boddie fraudulently induced Plaintiff Daniel Faison to sign statements to the effect that the loan proceeds had a "business purpose," without explaining to him that such statements under protections had the effect of eliminating the Federal Truth-In-Lending Act, 15 U.S.C. Section 1601 *et seq.*
- (d) Brandt's prior knowledge of, cooperation with, and participation in the fraudulent conduct outlined hereinabove inextricably links Brandt to those fraudulent acts.

Id. at ¶¶ 25(b)-25(d) (emphasis in original).

Plaintiffs' second claim alleged that defendants Nationwide and Brandt violated various provisions of the District of Columbia Consumer Protection Procedures Act, D.C. Code Ann. §§ 28-3901 to -3908 (1981 & Supp. 1987), in that they "made false and misleading representations, failed to state material facts, made and enforced unconscionable terms, and misrepresented their authority to lend, all in connection with the loan made to Plaintiffs." Complaint ¶ 28. Plaintiffs' third claim, characterized as "Legal Malpractice" in the Complaint but redesignated "Negligence" by the trial judge, alleged that Boddie "willfully, and with total disregard for the rights of Plaintiffs, withheld relevant information, offered misleading information, and negligently performed the responsibilities required of them [sic] at the settlement which is the subject of this litigation." *Id.* at ¶ 31.

Plaintiffs sought a total of \$200,000 in compensatory and punitive damages "against Defendants Nationwide, Tillette, Boddie, Hayman, Waters and Brandt, jointly and severally, on the basis of Plaintiffs' First and Second Claims." *Id.* at ¶ 33. Plaintiffs also sought \$200,000 in compensatory and punitive damages against defendant Boddie on the basis of the malpractice claim, "Boddie's partners being jointly and severally liable on this claim." *Id.* at ¶ 36.

At trial, the judge gave detailed instructions to the jury on the question of joint ventures and the attendant issue of joint and several liability. He specifically commissioned the jury to decide whether any liability stemming from the processing of the Faisons' loan involved a joint venture. Tr. at 1080-82 (jury instructions). Notwithstanding this explicit charge, the special verdict form he provided the jury made no provision for an explicit finding that a joint venture did or did not exist. Instead, the form was divided into four principal paragraphs, the first for damages on the default judgment against Tillette and Nationwide, who were listed together on the form ("Tillette/

Nationwide"), and then one for each of plaintiffs' three claims against the remaining defendants.

In paragraphs two through four, the form simply listed the names of each defendant, with blanks after each name to enable jurors to indicate a finding of liability, and the amount of the compensatory and punitive damages, if any, to be awarded against each. The jury found each defendant liable and, in accordance with the special verdict form, awarded compensatory and punitive damages against each defendant individually. We deal here only with the damages awarded on the claim of fraud.

The jury awarded most of the fraud damages, \$150,000 (\$100,000 compensatory and \$50,000 punitive), against Tillette/Nationwide, the defendants in default. The jury awarded another \$12,000 (\$5,000 compensatory and \$7,000 punitive), against defendant Boddie, the loan settlement attorney, and the remainder of the fraud awards, totalling \$11,600 (\$5,100 compensatory and \$6,500 punitive), was apportioned among Waters, Hayman and Brandt.

During the course of the trial, both sides sought to preserve their rights to move for judgment *non obstante verdicto* ("j.n.o.v."). Tr. at 917-18. In response, the court denied all pre-verdict motions, reserving for the parties instead the option of raising in post-verdict motions any and all issues that could have been raised in a motion for directed verdict. *Id.* at 918-19. In their motion for j.n.o.v., as well as in their present appeal, plaintiffs cite four legal bases for a judgment of joint and several liability: (1) concerted action, (2) vicarious liability, (3) common duty, and (4) single indivisible result. Plaintiffs' Supplemental Memorandum in Support of Motion for Judgment Notwithstanding the Verdict at 4-5; Brief for Faisons at 15-16 (both citing W. Prosser, *Law of Torts* § 52 at 315-16 (4th ed. 1971)).

Plaintiffs maintain that all four of these legal requisites are met in this case and therefore a judgment of joint and

several liability on the fraud claim is required as a matter of law. Plaintiffs further cite local District of Columbia case law for the proposition that joint and several liability is required when joint tortfeasors are found liable for a single injury. Plaintiffs' Supplemental Memorandum at 5 (quoting *McKenna v. Austin*, 134 F.2d 659, 664 (D.C. Cir. 1943)); Brief for Faisons at 16-17 (same quote). We note that for practical purposes the local case law's use of the term "single injury" comports with Prosser's term "single indivisible result."

Plaintiffs' motion for j.n.o.v. asked the court to find the defendants to the fraud claim jointly and severally liable for all damages awarded, i.e., both compensatory and punitive damages. The trial court denied plaintiffs' motion without explanation. *Faison v. Nationwide Mortgage Corp.*, Order (D.D.C. Sept. 16, 1985).

In addition to plaintiffs' substantive appeal on the issue of joint and several liability on the fraud claim, plaintiffs and defendant Boddie both cross-appeal from the judgment on evidentiary grounds. Plaintiffs maintain that the trial judge committed prejudicial error when he excluded the previous depositional testimony of defendant Tillette. That testimony allegedly would have informed the jury that the loan brokerage company was judgment-proof. This prejudice, plaintiffs claim, necessitates either a modified award of joint and several liability against all defendants or a remand on the issue of allocation of damages.

Boddie does not challenge the \$3,000 negligence award against him, but claims that the \$12,000 fraud award should be reversed because of erroneously admitted evidence and improper jury instructions. Boddie's principal evidentiary objection concerns evidence of other "bad acts" in which he denies having personally taken part. Over the objection of Boddie's counsel, the trial court allowed plaintiffs to elicit the testimony of three other ostensibly "business purpose" borrowers from Nationwide as evidence of a fraudulent pat-

tern. Although Boddie's firm conducted the loan settlements for each of these borrowers, Boddie was not the settlement attorney at any of them. Nor was he a partner in the law firm at the time of the settlements.

Boddie claims that the "bad acts" of any other person during these other settlements cannot be imputed to him, and that the admission of that evidence was reversible error. Boddie also argues that three other acts of the trial judge; namely, his refusal to allow him to present three witnesses who would have testified about his loan settlement procedures, his instruction to the jury suggesting that unconscionable loan terms could be taken as evidence of fraud, and his admission of testimony from plaintiffs' expert witness, necessitate the reversal of the fraud judgment against Boddie.

II. ANALYSIS

A. *Joint and Several Liability*

In the District of Columbia, the general rule is that joint tortfeasors are jointly and severally liable for compensatory damages. *Hill v. McDonald*, 442 A.2d 133, 137 (D.C. App. 1982). If any of the defendants in this case is found to be a party to a joint venture that caused tortious injury to plaintiffs, those joint venturers are also joint tortfeasors. See *Stevens v. Hall*, 391 A.2d 792, 794 (D.C. App. 1978).

After the trial judge instructed the jury on joint ventures, he specifically directed the jury to decide whether any liability stemming from the processing of the Faisons' loan involved a joint venture:

What is a joint venture? Where two, or more persons are engaged in an activity in which they are acting in pursuit of a common purpose and in which they have a mutual interest in the joint right of control, they are engaged in what is

known as a joint venture, or enterprise. . . . The jury should note that the joint-venture relationship is one which necessarily arises from some agreement between the parties, even [sic] expressed or reasonably implied, by which they undertake to share equally the responsibility for and the right to the management of the enterprise. . . . Since, whenever a joint venture exists, the conduct of one member of the venture is imputed to all of the others, it follows that your verdict in this case must be alike as to all defendants whom you find to be members of the joint venture. That is to say that if you favor one, you must find in favor of all the others. If you find one member of the joint venture to be responsible, you must find all other members of the joint venture responsible equally and jointly.

* * * *

If you find that one, or more of the parties, . . . were not members of the joint venture, you can not impute to such person the acts of the other, but you must confine yourselves to consideration of his acts alone and decide whether he should be liable for such acts.

Tr. at 1080-82 (jury instructions). Notwithstanding these specific instructions, the jury's special verdict form made no provision for finding of joint and several liability. Plaintiffs' and Boddie's attorneys cooperated in drafting the special verdict form, Tr. at 1058, and plaintiffs' attorney did not object to the fraud provisions in the form as submitted to the jury. Tr. at 1060-61 ("Other than [the default judgment instruction on the form], we are satisfied."), 1094 ("It looks all right to me."). This does not mean that plaintiffs waived their right to a determination of joint and several liability.

To assess the impact of the inconsistency between the jury instructions and the special verdict form, we look first to the Federal Rules of Civil Procedure:

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Fed. R. Civ. P. 49(a). According to this rule, as no party objected to the verdict form's lack of explicit questions as to whether each defendant was a party to the joint venture, the parties waived their right to a trial *by jury* as to that issue. *See Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 389 (8th Cir. 1987) ("[T]he special verdict here did not contain an interrogatory on . . . a disputed issue of fact. We hold, however, that this error is of no consequence now because [defendant] waived its right to a jury trial on this issue."). It was therefore up to the trial judge either to make a finding as to the dispositive factual issues that would legally require joint and several liability or to "be deemed to have made a finding in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(a); *cf. Guild v. Frontin*, 59 U.S. (18 How.) 135 (1855) ("Parties may, by consent, waive the trial of issues of fact by a jury, and submit the trial of both facts and law to the court.").

Notwithstanding his statutory authority to make express findings with respect to the joint venture and single injury issues, the trial judge merely entered judgment on the verdict (after trebling the compensatory damages for violations of the District of Columbia Consumer Protection Procedures Act, as authorized by D.C. Code § 28-3905(k)(1)(A)). Because the judge failed to make an express finding as to the existence of the alleged joint venture, under Rule 49(a) the court "shall be deemed to have made a finding in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(a). As the special verdict's allocation of damages individually to the various defendants is inconsistent with a finding of joint and several liability, we must deem that the judge, consistent with the jury's verdict, found no joint venture. *Cf. Rose Confections*, 816 F.2d at 389.

B. Joint and Several Liability as a Matter of Law

The jury's failure to find the existence of a joint venture by no means resolves the issue of joint and several liability. Nor does the application of Rule 49(a) address the trial judge's failure to consider the three other bases advanced by plaintiffs for a finding of such liability: vicarious liability, common duty, and single injury. Because we find that the facts in the record point so clearly to at least the last, i.e., single injury, we find reversible error in the trial judge's failure to address this claim when he acted on plaintiffs' motion for j.n.o.v. In light of the overwhelming evidence supporting plaintiffs' claim of a single injury, we conclude that a finding of joint and several liability was mandatory as a matter of law.

Under District of Columbia law, multiple defendants found liable for a single injury are deemed to be joint tortfeasors, and any compensatory damages for that single injury must be awarded jointly and severally against them. In *Leiken v. Wilson*, 445 A.2d 993 (D.C. App. 1982), the D.C. Court of Appeals stated:

If two or more tortfeasors produce a single injury, the plaintiff may sue each one for the full amount of the damage and hold the defendants severally liable; but the plaintiff can obtain only a single recovery, and each defendant will be entitled to a credit for any sum that the plaintiff has collected from the other defendant.

445 A.2d at 999 (citing *McKenna v. Austin*, 134 F.2d at 664).

Although Boddie claims that the jury found "separate and divisible" injuries to plaintiffs, Brief for Appellee Boddie at 54, such a finding is at best an inference, and by no means the only one that can be drawn in this case. We decline to read any such finding into the special verdict.

The jury's special verdict found each defendant liable on plaintiffs' claim of fraud, for which plaintiffs have consistently claimed a single injury, i.e., a single indivisible result—the loss of their home. Plaintiffs' fraud claim alleged that each of the defendants made affirmative statements and/or material misstatements or omissions that were not in accord with the facts regarding essential terms of the loan arrangement. Considering the specific elements of plaintiffs' claim, the jury finding of liability for that claim is obviously a finding of liability for the plaintiffs' principal injury. We accordingly dismiss defendant Boddie's argument that plaintiffs suffered "separate and divisible" injuries.

As the judge did not make an express finding as to the existence of a single indivisible result, under Rule 49(a) "the court . . . shall be deemed to have made a finding in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(a). In this instance, Rule 49(a) is of little help as neither a finding of a single indivisible result nor a finding of separate injuries would comport fully with the

special verdict. The former would be legally inconsistent with the jury's allocation of unequal compensatory damages among the various defendants; the latter would not accord with the jury's finding that each of the defendant was liable for fraud. As the judge did not instruct the jury on the consequences (in terms of the assessment of damages) that would flow from finding more than one defendant responsible for contributing to a single injury, we cannot draw any conclusions from the failure of the jurors to assess equal amounts (or an aggregate amount) against all the defendants.

The gravamen of plaintiffs' suit is a single *principal* injury—the loss of their home. District of Columbia law requires that the compensatory damages be awarded jointly and severally against all defendants found liable for contributing to that single *principal* injury. As the D.C. Court of Appeals said in *Greet v. Otis Elevator Co.*: "The jury should have been told there was only one injury and that the plaintiff could have only one verdict which could be against [any or all] defendants . . ." 187 A.2d 896, 898 (D.C. App. 1963).

Federal appellate courts are statutorily authorized to "modify . . . any judgment . . . of a court lawfully brought before it for review, and [to] remand the cause and direct the entry of such appropriate judgment . . . as may be just under the circumstances." 28 U.S.C. § 2106 (1982); *see Postow v. OBA Federal Savings & Loan Ass'n*, 627 F.2d 1370, 1386 (D.C. Cir. 1980); *United States v. Whitlock*, 663 F.2d 1094, 1101 (D.C. Cir. 1980). As local precedent prevents us from awarding the sum total of the compensatory damage awards against all tortfeasors, *Otis Elevator*, 187 A.2d at 898 ("It is a matter of conjecture whether the jury, if properly instructed, would have returned a verdict for the full amount against either defendant."), we are thus left with essentially two options—a new trial, or a modified judgment for less than the sum of the individual awards.

Recognizing that a new trial, even if restricted to the issue of compensatory damages, would be unduly burdensome on the parties, we prefer in this case to apply the rule adopted by many other jurisdictions: in actions against joint tortfeasors where the jury has erroneously apportioned damages, without stating an aggregate amount, apportionment of damages should be omitted, and the verdict directed against all defendants for the largest sum found against any defendant. *See, e.g., Goines v. Pennsylvania R.R. Co.*, 160 N.Y.S.2d 39 (N.Y. App. Div. 1957); *Kinsey v. William Spencer & Son Corp.*, 300 N.Y.S. 391 (N.Y. Sup. Ct. 1937), *aff'd mem.*, 8 N.Y.S.2d 529 (1938), *aff'd mem.*, 281 N.Y. 601 (1939); *Curtis v. San Pedro Transp. Co.*, 52 P.2d 528 (Cal. Dist. Ct. App. 1935); *G.A. Baker & Co. v. Polygraphic Co. of America*, 193 N.E. 265 (N.Y. 1934); *see generally Annotation, Propriety and Effect of Jury's Apportionment of Damages as Between Tortfeasors Jointly and Severally Liable*, 46 A.L.R.3d 801 (1972 & Supp. 1987). We accordingly direct the district court to enter a judgment of \$100,000 in compensatory damages jointly and severally against all defendants liable to plaintiffs on the fraud claim.

We note that plaintiffs have already acknowledged full satisfaction of judgment against at least two of the defendants. Such specific acknowledgments did not release the other joint tortfeasors from liability. *Hill v. McDonald*, 442 A.2d at 138-39. Any amounts already received by plaintiffs as compensatory damages in satisfaction of the fraud claim should be deducted from the \$100,000 joint and several award. *Cf. Otis Elevator Co. v. Henderson*, 514 A.2d 784, 786 (D.C. App. 1986) (pre-trial settlement deducted).

C. Hazards of Special Verdicts

The problem of improper jury apportionment of compensatory damages on a special verdict form is not unique to this jurisdiction. The Second Circuit recently adjudicated

a securities fraud case, holding that the jury in fact intended to award the total of the apportioned *compensatory* damages against each defendant jointly and severally:

The confusion arises from the fact that the special interrogatories submitted to the jury invited them to answer separately as to each defendant the amount of compensatory damages to be recovered by plaintiff. . . . The jury separately assessed punitive damages against the defendants and, in the same way, assessed the amount of compensatory damages that each defendant would pay. We reiterate, however, that this form of verdict should be avoided where defendants, if liable, are liable jointly and severally for a single injury. *See Gagnon v. Ball*, 696 F.2d 17, 19 n.2 (2d Cir. 1982). The jury should be asked, instead, what amount of damages the plaintiff has suffered. Damages in this amount can then be awarded, jointly and severally, against each defendant found liable.

Aldrich v. Thompson McKinnon Securities, Inc., 756 F.2d 243, 248 (2d Cir. 1985). The Second Circuit accordingly vacated the judgment of the district court and remanded with directions that the trial court enter an order for a new trial.

The cross-citation to *Gagnon v. Ball* in *Aldrich* is on point with the case now before us. In *Gagnon v. Ball*, Judge Newman discussed the same type of problem we face with special interrogatories when both compensatory and punitive damages are awarded in a civil lawsuit with multiple defendants:

The special interrogatories submitted to the jury explicitly invited them to answer separately as to each defendant the amount of compensatory damages to be recovered by the plaintiff. No objection to this form of verdict was made at trial,

nor is any issue concerning the separate awards of compensatory damages raised on appeal. Nevertheless, since the problem may recur, we note the inadvisability of the procedure used. Where, as here, defendants, if liable at all, are liable for causing the same injury, a jury given special interrogatories should be asked what amount of damages the plaintiff has suffered. All defendants found liable for the injury are then jointly and severally liable for the single award of compensatory damages. If the evidence permits a finding that more than one type of injury was suffered (e.g., false arrest and unlawful search) and that not all of the defendants may have caused each of the injuries, a special interrogatory should permit the jury to determine the compensatory damages for each injury; such damages are then properly awarded, jointly and severally, against all [defendants] liable for such damages. Punitive damages, however, are properly assessed separately against individual defendants.

Gagnon v. Ball, 696 F.2d 17, 19 n.2 (2d Cir. 1982).

We share the concerns expressed by the Second Circuit. In light of the severe limitations inherent in a resort to special verdict forms, we urge extreme caution in their use where multiple defendants are involved.

D. Evidentiary Challenges

We find neither plaintiffs' nor Boddie's evidentiary arguments persuasive because none of the alleged discrepancies is clearly prejudicial.

1. Boddie's Objections to "Bad Acts" Evidence

a. *Admissibility of Pattern Evidence.* Evidence of other crimes, wrongs, or acts is sometimes admissible for

the purposes described in Federal Rule of Evidence 404(b), which reads as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In admitting such "bad acts" evidence, "[t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence . . . under Rule 403." Fed. R. Evid. 404(b) advisory committee's note.

Plaintiffs proffered the "bad act" evidence in question in order to demonstrate a consistent "plan," i.e., as pattern evidence of a loan fraud scheme. The evidence objected to by Boddie involved prior loan settlements in which members of Boddie's law firm served as settlement attorneys. In at least one of the other "bad act" settlements, plaintiffs' witness testified that he believed Boddie was present and "sitting at the head of the table" during settlement. Tr. at 197. The evidence evinced from the other pattern witnesses was arguably not probative of Boddie's liability for fraud in this case and, even if marginally relevant on that issue, was almost surely more prejudicial than probative; therefore, its admission violated Rule 403. Nevertheless, because there was substantial evidence (properly before the jury) of Boddie's participation in the fraud charged, we find that the erroneous admission of the "bad acts" evidence did not have a sufficient impact at trial to render the verdict against Boddie "inconsistent with substantial justice." Fed. R. Civ. P. 61.

b. *Prejudice.* Boddie relies heavily on this court's recent decision in *United States v. Hernandez*, 780 F.2d 113 (D.C. Cir. 1986), to support his argument that it was reversible error for the trial judge to admit evidence

against him "of extrinsic acts in which he did not participate." Reply Brief for Cross-Appellant Boddie at 5.

Hernandez was a criminal case involving the admission of evidence that a bystander had shouted unintelligible words during a fight involving two other parties. The court concluded that as the meaning of the words was unknown, the mere fact that the bystander shouted could not be offered as evidence that the bystander was involved in the fight. The court observed that even if the words did constitute a form of involvement, their probative value was outweighed by their prejudicial effect. 780 F.2d at 118. The court further determined that the erroneous admission of this evidence was not "harmless error" under Fed. R. Crim. P. 52(a), as "[t]he case against [the defendant] was quite close[,] once the evidence of the fight is eliminated . . ." *Id.* at 119. The court then concluded that, "[b]ecause admission of evidence of a 'prior bad act' to which appellant . . . was not a party unduly prejudiced his trial," the court would "vacate the verdict and remand his case for a new trial untainted by such prejudicial testimony." *Id.* at 122.

The parallel between the "bad act" evidence in the present case and in *Hernandez* is substantial, because in both cases the defendant's involvement in the prior "bad acts" is uncertain and possibly marginal. We agree with the *Hernandez* court that the admission of this type of evidence "would naturally lead a jury to assume that [the defendant] had the motive of his associates" and therefore the "slim probative value" of the evidence is normally "overwhelmed by its prejudicial effect," and it should be excluded. *Id.* at 118.

The present case, however, differs substantially from *Hernandez* in the effect of the "bad act" evidence upon the final verdict. In the case before us, the prejudicial effect of the testimony objected to is much less clear. There is ample independent evidence in the record to im-

plicate Boddie in the specific transaction that is at issue. That evidence includes:

Boddie's acknowledged close ties to Hayman and Tillette, e.g., his "partnership" in the loan business, directorship in Area Mortgage, and legal work on behalf of Nationwide. Tr. 70; 85; 515-16; and 734.

Boddie's insistence that the loan be characterized as a business loan. Tr. 42-43; 35-36; and 75.

Boddie's representation that long-term refinancing would be available within the one-year term. Tr. 76-78.

Boddie's admissions to David Hughes that he did not care if the borrowers had businesses at all, so long as they signed the forms. Tr. 232.

The expert opinions of Professor Rohner and Benny Kass that the loan settled by Boddie was a consumer loan, not a commercial loan. Tr. 262-64 and 334.

Water's admission that the Faisons got "ripped off" by the other parties to the settlement. Tr. 437.

Reply Brief for Cross-Appellants (Faisons) at 14-15.

In addition to the above, Boddie admitted during cross-examination that prior to settling the Faisons' loan he was aware of allegations that Nationwide was in the practice of "allegedly making business-purpose loans that were, in fact, not business-purpose loans." Tr. at 737. Furthermore, although Boddie represented to the Faisons at the settlement that he was Nationwide's attorney, Tr. at 658, he admitted in cross-examination that although the Faison loan settlement involved D.C. property and D.C. law, he was not a member of either the District of Columbia or

Virginia Bars. Tr. at 697; see law firm letterhead on Plaintiffs' Exhibit No. 20.

Given this abundant evidence of Boddie's personal involvement in the loan transaction, his implied representation that he was licensed to advise on matters involving District of Columbia law, and his personal association with the principals in the real estate loan enterprise, we conclude that even if the "bad acts" evidence was improperly admitted, it was not so prejudicial to Boddie's defense as to render the verdict "inconsistent with substantial justice." Fed. R. Civ. P. 61. *Cf. Czajka v. Hickman*, 703 F.2d 317, 319 (8th Cir. 1983) (plaintiff was properly impeached on several grounds so that improper cross-examination about a prior conviction was harmless under Rule 61).

2. Boddie's Other Objections

Boddie raises three other bases for reversible error: the trial court's refusal to allow him to present three additional witnesses regarding his loan settlement practices, the court's instruction to the jury that it could find fraud if it believed the Faisons' loan transaction was unconscionably one-sided, and the court's allowing plaintiffs to proffer testimony of an expert witness concerning other loans. Brief for Cross-Appellant and Appellee Boddie at 31-46. We have examined each of these bases and find them to be harmless error, if error at all.

The court did not disallow all testimony concerning Boddie's loan settlement practices. At least four witnesses testified to their personal knowledge of those practices. The jury instruction to which Boddie objects was contained in the last paragraph of a very clear five-page instruction detailing the essential elements of fraud. Given the instruction as a whole, the jury could have had no doubts as to what was required for finding a fraud. As to the testimony of plaintiffs' expert witness, Professor Rohner, it merely augmented other pattern evidence proffered by plaintiffs. Because, in context, none of the alleged errors

"affect[ed] the substantial rights of the parties," Fed. R. Civ. P. 61, we conclude that even if Boddie's contentions were correct, none of the matters complained of constitutes reversible error.

3. The Exclusion of Tillette's Deposition

The trial court refused to allow the Faisons to introduce prior depositional testimony of Tillette, who was unavailable as a witness because he had pleaded the Fifth Amendment. During its deliberations, the jury specifically asked whether Nationwide was still in business. Tr. at 1100. The court answered: "Well, there is no evidence in the record as to whether or not Nationwide is in business. You can draw your own conclusions as to that. The important thing is that Nationwide is still alive for the purpose of being sued." Tr. at 1102. Had the deposition been admitted, it would have established that Nationwide was little more than a corporate shell devoid of assets. Brief for Cross-Appellants (Faisons) at 19-20.

Given the disproportionate size of its compensatory award against Tillette/Nationwide, the jury may well have based its determinations of damages on the erroneous belief that Nationwide had resources from which damages could be paid. *Cf. Pyne v. Jamaica Nutrition Holdings Ltd.*, 497 A.2d 118, 133 (D.C. App. 1985) ("But the verdicts demonstrate that the amount of compensatory damages assessed against appellants was affected by inadmissible evidence."). The determinative issue, therefore, is whether plaintiffs have been prejudiced by the exclusion of the deposition.

a. *Admissibility of Prior Depositional Testimony.* Former testimony of a witness under oath is admissible evidence under an exception to the hearsay rule when the witness is "unavailable" by virtue of pleading the Fifth Amendment privilege:

(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; . . .

* * * *

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed. R. Evid. 804. Tillette's unavailability is not disputed. Nor is it disputed that Tillette and Nationwide "had an opportunity and similar motive to develop the testimony" at the prior proceeding.

b. *Prejudice.* Even if we assume *arguendo* that Tillette's deposition was admissible, we must still determine whether the plaintiffs were prejudiced by its exclusion. When punitive damages are to be awarded, the jury's knowledge of the financial capabilities of the defendants is important to the administration of justice: "[P]unitive damages must be related to the degree of culpability and the defendants' ability to pay if they are to carry their intended sanction. . . . Therefore, evidence of each defendant's financial standing should be admissible." *Re-*

meikis v. Boss & Phelps, Inc., 419 A.2d 986, 992 n.* (D.C. App. 1980) (citation omitted). The facts before us now suggest that the jury awarded a total of \$75,000 in punitive damages against two defendants who had no money at all.

Punitive damages, however, are not meant to compensate plaintiffs for their losses. They are intended to punish guilty defendants and to deter would-be defendants. *See* cases cited in part E *infra*. The Faisons are not prejudiced, therefore, because punitive damages cannot be paid. If any prejudice resulted from the exclusion of the Tillette deposition, it was in whatever effect the exclusion may have had in the jury's assessment of compensatory damages among the parties found liable for their respective contributions to the single injury committed against the Faisons. As damages for such an injury are properly measured by the actual injury suffered by the plaintiffs, we conclude that if the exclusion of the Tillette deposition represented an abuse of discretion, in light of the disposition of this appeal (which takes the compensatory award against Tillette/Nationwide as the measure of the damages for which all the defendants are jointly and severally liable), it was no more than harmless error. *Compare Hub v. Sun Valley Co.*, 682 F.2d 776, 777 (9th Cir. 1982).

E. Allocation of Punitive Damages

The Faisons are asking that the *total* verdict on the fraud charge, \$110,000 in compensatory damages and \$63,500 punitive damages, be directed jointly and severally against each of the defendants. Brief for Faisons at 17. In the District of Columbia, punitive damages may be awarded individually against joint tortfeasors:

While *compensatory* damages may not be apportioned among joint tort feasors [sic] in the District of Columbia . . . , there appears to be no prior decision whether *punitive* damages may be apportioned. Courts in other jurisdictions differ

on this question. . . . We feel the better rule is that punitive damages may be apportioned among joint tortfeasors because punitive damages must be related to the degree of culpability and the defendants' ability to pay if they are to carry their intended sanction. . . . Therefore, evidence of each defendants' financial standing should be admissible.

Remeikis v. Boss & Phelps, Inc., 419 A.2d at 992 n.* (D.C. App. 1980) (citations omitted) (emphasis in original).

One of the authorities cited by the court in *Remeikis* is *Cheek v. J.B.G. Properties, Inc.*, 344 A.2d 180 (Md. App. 1975), a Maryland case which in turn relies on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), for the general proposition that punitive damages "are not compensation for injury; instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Cheek*, 344 A.2d at 190 (citing *Gertz*, 418 U.S. at 350). *Cheek* further cites an 1899 Supreme Court case for the proposition that "[w]ithout apportionment of punitive damages, the admission of evidence of wealth of an affluent defendant can be devastating to an impecunious co-defendant who may well be far less culpable." 344 A.2d at 190 (citing *Washington Gas Light Co. v. Lansden*, 172 U.S. 534, 552-53 (1889)). In *Washington Gas Light*, the Supreme Court held that under the common law of the District of Columbia the evidence of one co-defendant's wealth could not be admitted for the purpose of determining the amount of punitive damages against all co-defendants:

While a [joint tortfeasor] defendant who is least to blame is still liable for all the damages suffered by plaintiff, he is not liable to respond in punitive damages, the amount of which may be based upon particular evidence of the wealth of some other defendant.

172 U.S. at 553.

It is thus clear that under the laws of the District of Columbia, punitive damages may be apportioned among joint tortfeasors. Accordingly, we reject plaintiffs' request that the punitive damages be directed jointly and severally against the defendants and affirm the jury's allocation of punitive damages against each of them.

III. CONCLUSION

As the jury expressly found each defendant liable for the same charge of fraud, we hold that the district court's entry of judgment on the special verdict was an error of law, and we remand with directions to enter judgment of \$100,000 in compensatory damages jointly and severally against all defendants. We affirm the jury's findings of liability, and we affirm the punitive damage awards against each individual defendant.

Affirmed in part, reversed in part, and remanded with directions.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6045

DANIEL GORDON FAISON, *et al.*
v.

NATIONWIDE MORTGAGE CORPORATION, *et al.*

RICHARD F. BODDIE,
FDBA—RUTTENBERG, PHELPS & SLOCUM
DBA—PHELPS, SLOCUM & BODDIE,

Appellant.

No. 85-6105

DANIEL GORDON FAISON, *et al.*,

Appellants,

v.

NATIONWIDE MORTGAGE CORPORATION, *et al.*

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 84-00312)

ON PETITION FOR REHEARING

Filed March 4, 1988

James L. Blair for appellees/cross-appellants Faison, *et al.*

John H. Spellman, with whom *Robert F. Reklaitis* and *Robert P. Fletcher* for appellant/cross-appellee Richard F. Boddie.

Before: *MIKVA* and *BUCKLEY*, *Circuit Judges*; *PARSONS**, *Senior District Judge*, U.S. District Court for the Northern District of Illinois.

ORDER

Upon consideration of the petition for rehearing of appellant Boddie and of the response thereto, it is

ORDERED, by the court, that the petition is granted on the issue of excessive compensatory damages, denied on all other issues and the cases remanded to the District Court, all for the reasons more fully set forth in the attached memorandum.

Per Curiam

MEMORANDUM

PER CURIAM: The facts of these cases are fully set forth in this court's prior opinion, issued October 30, 1987. The plaintiffs in these cases have sought damages from six defendants for the loss of their home, as a result of a fraudulent loan scheme. The trial court entered judgment on a jury verdict awarding, *inter alia*, an aggregate amount of \$110,100 in compensatory damages on the fraud count of the complaint. Following a special verdict form, the jury apportioned this amount unequally among the defendants. On appeal, this court held that the jury's verdict necessarily resulted in joint and several liability among the defendants for plaintiffs' total compensatory damages from fraud. Since the special verdict form did not elicit such a figure from the jury, this court determined that the highest amount awarded against any individual

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

defendant should be taken to represent the total of fraud damages found by the jury, for which each defendant would be jointly and severally liable. That figure was \$100,000.

Appellant Boddie, whose individual liability for compensatory damages for fraud was set by the jury at \$5,000, petitions this court for rehearing. Boddie asserts (1) that this court's modification of the jury verdict violates the seventh amendment, (2) that the modification is contrary to District of Columbia law, (3) that the modification is not permitted under 28 U.S.C. § 2106 (1982), (4) that the modification is not justified by the case law of other jurisdictions, (5) that the entire verdict against him should be vacated as the product of inadmissible evidence, and (6) that a verdict of \$100,000 is excessive because it is not supported by the evidence.

We find that only the last of these issues warrants consideration on rehearing. Indeed, the last issue is not really being "reheard;" because of the unusual history of this case, the question of an excessive verdict is raised for the first time by our decision on appeal. The individual defendants against whom the jury awarded \$100,000 in the trial below were Nationwide Mortgage and its president, Norman Tillette. Neither of these parties entered appearances in the case, and because of their defaults there was no party before the trial court with standing to challenge the \$100,000 award as exceeding the evidence. As a result of this court's decision on appeal, however, appellant Boddie now has the requisite standing to raise the excessive verdict question, and we agree that it warrants our attention.

Common sense and this Circuit's precedents indicate that challenges to the size of a verdict should usually be addressed in the first instance by the trial court. "[T]he trial judge has the chief responsibility for passing on the question as to whether a new trial is to be granted on the ground of excessive or inadequate damages . . . [and] must,

as a result, be given an opportunity to exercise his discretion." *Ryen v. Owens*, 446 F.2d 1333, 1334 (D.C. Cir. 1971). Accordingly, in addition to the disposition of the appeals set forth in our opinion of October 30, 1987, we now also remand these cases to the trial court so that it can examine the excessive verdict question.

As we stated in our recent opinion, "a new trial, even if restricted to the issue of compensatory damages, would be unduly burdensome on the parties" in this case. *Faison v. Nationwide Mortgage Corp.*, Nos. 85-6045 & 85-6105, slip op. at 14 (D.C. Cir. October 30, 1987). Therefore, if the trial judge determines on remand that the evidence does not support an award of \$100,000, we believe he should condition his order for a new trial on a remittitur in the appropriate amount. Both parties will be served if the further delay and expense of a new trial are avoided through the expedient of a remittitur.

Boddie's request for rehearing on the issue of the verdict size is granted and as to the other issues is hereby denied. The cases are remanded for the trial judge's evaluation of a motion for a new trial or remittitur on the grounds of an excessive verdict. This memorandum and accompanying order, along with the opinion and judgment of October 30, 1987, shall constitute the mandate of the Court at such time as it issues.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL GORDON FAISON, <i>et al.</i>)	
)	
<i>Plaintiffs,</i>)	
vs.)	
NATIONWIDE MORTGAGE)	Civil Action
CORPORATION, <i>et al.</i>)	No. 84-0312
)	(Judge Pratt)
<i>Defendants.</i>)	

[Filed July 29, 1985]

JUDGMENT

1. This Civil Action came on for trial on July 8 through July 16, 1985, before the Court and a jury, the Honorable John H. Pratt, District Judge presiding.
2. In Count I, Plaintiffs, Daniel and LaShavio Faison, alleged fraud and misrepresentation against Nationwide Mortgage Corporation, Norman C. Tillette, Richard F. Boddie, Walter Waters, Joseph Hayman, and David Brandt, with Plaintiffs seeking both compensatory and punitive damages. In Count II, Plaintiffs alleged violations of the District of Columbia Consumer Protection Procedures Act, D.C. Code Section 28-3901 *et. seq.*, against Nationwide Mortgage Corporation, Norman C. Tillette, Walters Waters, Joseph Hayman, and David Brandt, seeking both compensatory and punitive damages. In Count III, Plaintiffs also alleged legal malpractice against Defendant Richard Boddie, which this Court has deemed to be a claim for negligence involving Mr. Boddie.

3. A default judgment was entered by the Court against Norman C. Tillette and Nationwide Mortgage Corporation on the fraud and District of Columbia Consumer Protection Procedures Act counts because those Defendants failed to appear and defend this case. Defendant Hayman crossclaimed against Defendants Nationwide Mortgage Corporation and Norman C. Tillette, seeking an award in any amount of damages for which Hayman was to be found liable to Plaintiffs. Defendant Waters crossclaimed against Nationwide Mortgage Corporation, Norman C. Tillette and Richard Boddie, seeking an award from those Defendants for whatever damages, if any, were found against Waters in favor of Plaintiffs.

Jury Award

4. These issues and violations having been duly tried, the Court having instructed the jury to utilize a special verdict form as to all issues and violations, and the jury having duly rendered its verdict, the jury found in favor of Plaintiffs as follows: *As to Nationwide Mortgage Corporation and Norman C. Tillette:*

a) The jury awarded compensatory damages against Nationwide Mortgage Corporation and Norman C. Tillette on grounds of fraud in the amount of \$100,000.00. The jury awarded punitive damages against Nationwide Mortgage Corporation and Norman C. Tillette on grounds of fraud in the amount of \$50,000.00.

b) The jury awarded compensatory damages against Nationwide Mortgage Corporation and Norman C. Tillette on grounds of violations of the District of Columbia Consumer Protection Procedures Act, in the amount of \$35,000.00. The jury awarded punitive damages against Nationwide Mortgage Corporation and Norman C. Tillette on grounds of violations of the District of Columbia Consumer Protection Procedures Act, in the amount of \$25,000.00.

5. *Fraud As to Waters, Hayman, Boddie and Brandt:*

a) The jury found that Defendant Waters had committed fraud against Plaintiffs, and was liable to Plaintiffs in the amount of \$1,000.00 compensatory damages, and \$1,000.00 punitive damages.

b) The jury found that Joseph Hayman had committed fraud against Plaintiffs, and awarded compensatory damages in the amount of \$2,000.00 and punitive damages in the amount of \$4,000.00.

c) The jury found that Richard Boddie committed fraud against Plaintiffs, and awarded compensatory damages in the amount of \$5,000.00 and punitive damages in the amount of \$7,000.00.

d) The jury found that David Brandt committed fraud against Plaintiffs, and awarded compensatory damages in the amount of \$2,100.00 and punitive damages in the amount of \$1,500.00.

6. District of Columbia Consumer Protection Procedures Act Violations as to Waters and Hayman:

a) The jury found that Walter Waters had violated the District of Columbia Consumer Protection Procedures Act, and found him liable to Plaintiffs in compensatory damages in the amount of \$500.00 (such amount being trebled by this Court to \$1,500.00, in accordance with D.C. Code Section 28-3905(k)(1)(A)).

b) The jury found that Joseph Hayman violated the District of Columbia Consumer Protection Procedures Act, and is liable to Plaintiffs in compensatory damages in the amount of \$500.00 (such amount being hereby trebled by this Court to \$1,500.00, in accordance with D.C. Code Section 28-3905(k)(1)(A)), and punitive damages in the amount of \$1,200.00.

7. The Court having treated Plaintiffs' legal malpractice count as one in negligence, the jury found that Richard Boddie committed negligence in his duties toward

Plaintiffs, and awarded compensatory damages against Richard Boddie in the amount of \$3,000.00.

8. The jury awarded nothing to Defendant Hayman on his crossclaim. The jury awarded nothing to Defendant Waters on his crossclaim.

IT IS HEREBY ADJUDGED, ORDERED and DECREED that the jury's verdict is entered this date.

Dated this 29th day of July, 1985.

/s/

JOHN H. PRATT
Judge, United States
District Court for the
District of Columbia



(2)
No. 87-1990

Supreme Court, U.S.
FILED
AUG 5 1988

JOSEPH SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RICHARD F. BODDIE,
Petitioner,
v.

DANIEL G. FAISON, *et al.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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August 5, 1988

QUESTION PRESENTED

Whether a court of appeals may, consistent with the Seventh Amendment, interpret a jury's intent in light of inconsistent jury instructions and special verdict forms.

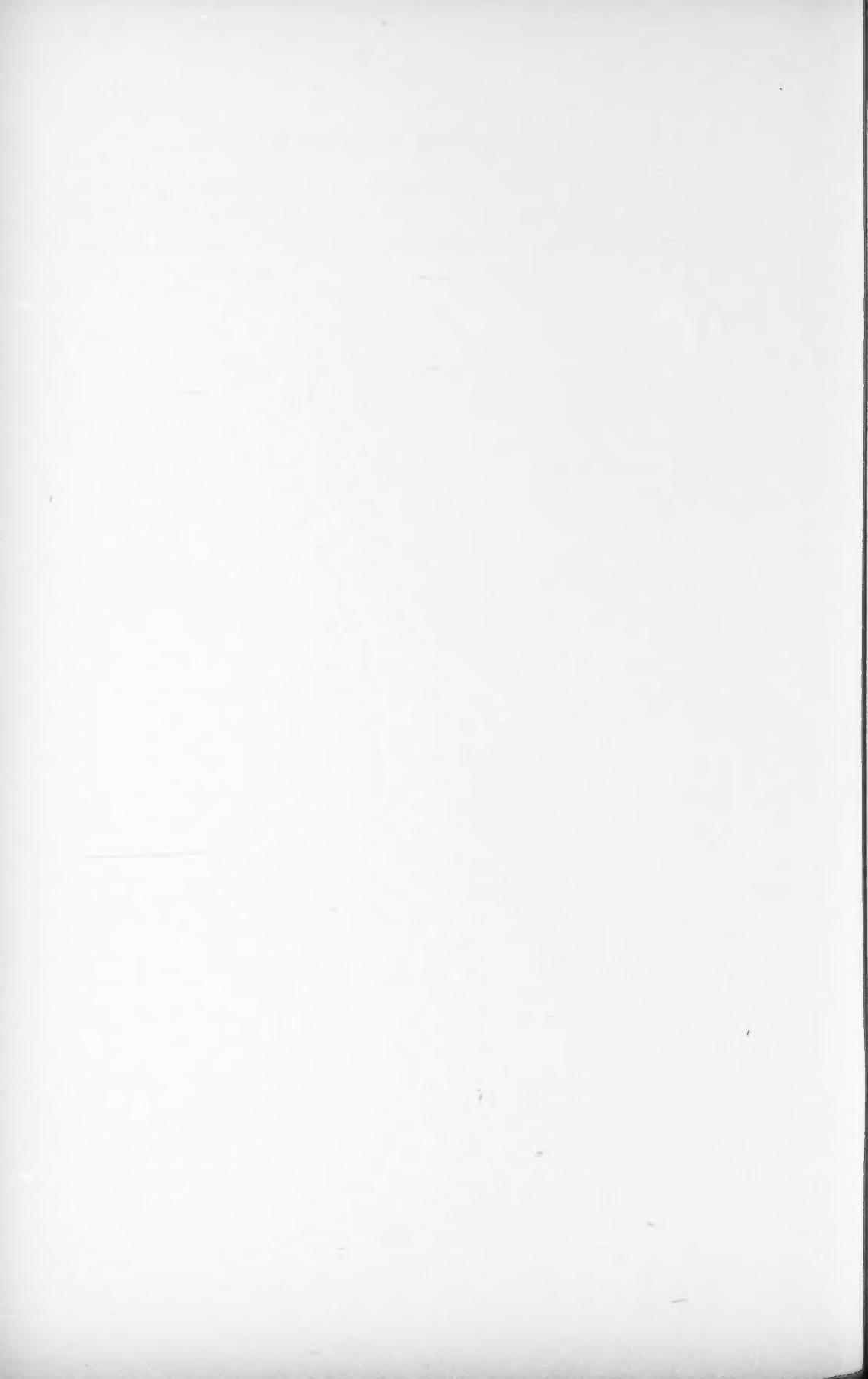


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IN THE
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RICHARD F. BODDIE,

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, including its decision on panel rehearing (Pet. App. 1a-30a), is reported at 839 F.2d 680. The judgment of the district court (Pet. App. 31a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1987 (Pet. App. 1a), and revised on petitioner's request for rehearing on March 4, 1988. Pet. App. 27a. The petition for a writ of certiorari was filed

on June 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner, Richard F. Boddie, engaged in a scheme to defraud Daniel and LaShavio Faison out of their home. Specifically, Mr. Boddie played an instrumental role in luring the Faisons, who were attempting to obtain a second mortgage on their home, into accepting a one-year "balloon" note bearing a true interest rate of approximately seventy-five percent secured as a second trust on their home. After losing their home in the ensuing foreclosure, Mr. and Mrs. Faison brought suit in the district court alleging, *inter alia*, fraud against Mr. Boddie and his confederates. The jury, instructed as to joint ventures, nonetheless was presented with special verdict forms which requested that the jury state not the amount of damages the Faisons sustained, but instead the amount of damages each defendant would have to pay. Nonetheless, the jury unambiguously found that Mr. Boddie and his five codefendants had defrauded the Faisons, and the jury found that the Faisons were entitled to at least \$100,000 in compensatory damages for the single injury resulting from this fraud—the loss of their home.

On the parties' cross-appeals, the court of appeals held that Mr. Boddie was jointly and severally liable to the Faisons as a matter of law. Accordingly, the court held that because the minimum amount the jury considered adequate to compensate the Faisons was \$100,000, Mr. Boddie was fully liable for that amount. Mr. Boddie now seeks review in this Court contending that the court of appeals' interpretation of the jury's intent violates the Seventh Amendment.

1. Mr. Boddie's involvement in the scheme to defraud the Faisons was substantial. Although not licensed to

practice law in either the District of Columbia or Virginia (the location of the property and place of settlement, respectively), Mr. Boddie acted as the settlement attorney who carried out the fraudulent transaction and misled the Faisons about its terms. From the onset, Mr. Faison wanted to obtain a second mortgage on his home so that he could make repairs to his house, including his roof and heating plant, and so he could pay off some personal bills. Mr. Faison was approached by a broker for Nationwide Mortgage Corporation, who advised him that he could arrange such a loan on either a five, ten or fifteen year term. While Mr. Faison needed only \$10,000, Mr. Boddie's confederates encouraged Mr. Faison to borrow \$14,000, ostensibly on a five year term.

While Mr. Faison's need for the loan was strictly personal, Mr. Boddie and others advised Mr. Faison to state that the loan was intended for business purposes. The effect of this misrepresentation, which was not explained to Mr. Faison, was to bring the loan outside the protections of the Truth in Lending Act, 15 U.S.C. § 1603(1). Thus it was not until the day of settlement that Mr. Faison learned that he would receive only \$7,324.94 of the \$14,000 he had borrowed (the remainder going to discount fees, brokerage fees, settlement costs and Mr. Boddie's attorney fees), and even then Mr. Faison was never informed that the true interest rate on this loan was not 18% as represented by Mr. Boddie, but instead closer to 75%. While Mr. Faison was told that the loan he had obtained was a one year balloon note, rather than the five year second trust he had wanted, he was assured that refinancing of the loan would be immediately available, and, indeed, that he would receive the remainder of his \$14,000 upon refinancing. In fact no refinancing was forthcoming, even though to the very day of foreclosure (in which Mr. Boddie represented the lender) Mr. Boddie and other codefendants impressed upon Mr. Faison that the loan would be refinanced. On August 30, 1983, just

thirteen months after Mr. Boddie's settlement of the loan, the Faisons lost their house.

2. The jury returned a verdict finding fraud by all defendants, including Mr. Boddie. Inconsistent with the instructions concerning joint ventures, however, the jury was presented with special verdict forms which elicited separate damages awards against each defendant. Thus, the jury awarded compensatory damages of \$100,000 against Nationwide Mortgage (and its president), a total of \$3,000 against the brokers who solicited the Faisons' loan, \$2,100 against the investor who actually supplied the capital, and \$5,000 against Mr. Boddie. (The jury also separately awarded a total of \$63,500 of punitive damages against all of these defendants, of which \$7,000 was awarded against Mr. Boddie.)

On the parties' cross-appeals, the court of appeals held that notwithstanding the jury's assessment of damages against the individual defendants, in the District of Columbia Mr. Boddie and his codefendants were jointly and severally liable as a matter of law. The Faisons suffered a "single indivisible result—the loss of their home." Pet. App. 13a. Under District of Columbia law, "multiple defendants found liable for a single injury are deemed to be joint tortfeasors, and any compensatory damages for that single injury must be awarded jointly and severally against them." Pet. App. 12a. *See also, Leiken v. Wilson, 445 A.2d 993, 999 (D.C. 1982).* The court concluded, therefore, that Mr. Boddie must be held to answer fully for the Faisons' losses.

District of Columbia law precluded the court of appeals from holding all the defendants jointly and severally liable for the cumulative amount found by the jury against each defendant. *Greet v. Otis Elevator Co., 187 A.2d 896, 898 (D.C. 1963).* Recognizing that a new trial, even if limited to the issue of compensatory damages, would be unduly burdensome, the court instead ordered that defendants be jointly liable for the largest amount

awarded against any defendant individually—\$100,000. Pet. App. 15a. It may have been speculative whether the jury would have awarded the total \$110,100 damages were it not for the special verdict forms; it was certain, however, that the jury found that the damages the Fasons sustained as a result of the loss of their home were at a minimum \$100,000. Accordingly, rather than order a new trial on the issue of damages, the court of appeals remanded the case to the district court with instructions to enter a judgment against all defendants jointly and severally in the amount of \$100,000.

3. Mr. Boddie timely requested rehearing of the panel's decision, alleging, among other things, that there was insufficient evidence to support the verdict of \$100,000. Because the issue was never questioned at trial (judgment had been taken against Nationwide Mortgage and its president by default), the court of appeals granted Mr. Boddie's request and remanded the case to the district court with instructions to consider Mr. Boddie's challenge to the sufficiency of the evidence and, if it found it meritorious, to order *remittitur* or a new trial on the issue of damages. Mr. Boddie's motion for a new trial is currently pending in the district court.

REASONS FOR DENYING THE WRIT

This petition presents questions that are peculiarly limited to the facts of this case and that do not raise issues of substantial public concern. The court of appeals' conformance of the judgment to the jury's obvious intent was a routine exercise of that court's authority which was, rather than violative of the Seventh Amendment, indeed commanded by it. Moreover, as the court of appeals remanded this case to the district court for consideration of the sufficiency of the evidence, this case is not presently in an appropriate posture for review by this Court. For these reasons, the petition should be denied.

1. The jury found that Mr. Boddie, and each of his confederates, had defrauded the Faisons. The minimum amount the jury found necessary to compensate the Faisons for this fraud was \$100,000. The court of appeals held that all the defendants, including Mr. Boddie, were jointly and severally liable as a matter of law. Thus the court of appeals held that Mr. Boddie was jointly and severally liable to the Faisons for the full \$100,000.

Mr. Boddie contends that the court of appeals violated his Seventh Amendment right to trial by jury because the net result of its decision was an increase in his liability from that originally assessed against him individually by the jury. Thus, apparently reading *Dimick v. Schiedt*, 293 U.S. 474 (1935), as creating an absolute rule that a jury verdict against an individual may not in any circumstances be increased, Mr. Boddie suggests that the court engaged in an impermissible *additur* in violation of the Seventh Amendment.

The Seventh Amendment does not require such talismanic adherence to verdict forms. Rather, the constitutional imperative is to respect the jury's *intent*; *i.e.*, for a court to endeavor, whenever possible, to harmonize inconsistent verdicts and to give full force to the jury's findings. *Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 119 (1963); *Aquachem Co., Inc. v. Olin Corp.*, 699 F.2d 516, 521 (11th Cir. 1983). Mr. Boddie suggests that the court of appeals could not discern the jury's intent, but indeed the jury's intent was manifest: each of the defendants, including Mr. Boddie, defrauded the Faisons and at least \$100,000 in damages was necessary to compensate for their injury.* The court of appeals merely

* It may be that the jury believed that more than \$100,000 (*i.e.* the aggregate \$110,100 awarded against all defendants) was necessary to fully compensate the Faisons, but the court of appeals refused to so speculate. See Pet. App. 14a. What can be said to a certainty about the jury's determination of the Faisons' overall injury is that it could not have been any less than what the jury

concatenated the jury's finding of fraud, the establishment of joint and several liability as a matter of law, and the jury's finding of a minimum of \$100,000 compensatory damages due to determine that Mr. Boddie was jointly and severally liable for this amount. The Seventh Amendment did not prohibit the court from so conforming the judgment to the jury's intent; to the contrary, it required it. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).

Similarly, Mr. Boddie's suggestion that the decision below is inconsistent with *Dimick v. Schiedt*, 293 U.S. 474, is incorrect. In *Dimick*, this Court recognized that the critical distinction between *additur* and *remititur* for Seventh Amendment purposes is that in the former the jury has never passed on the greater amount. *Id.*, at 485. This, of course, cannot be said here, for the jury explicitly found that the injury to the Fasons was at least \$100,000. The jury having awarded damages in at least this amount, Mr. Boddie cannot be heard to complain that the court impermissibly added to the jury's verdict when he was jointly and severally liable as a matter of law.

Moreover, while this situation has arisen only rarely, the decision below comports with the other courts' treatment of this issue. See e.g. *G. A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 963-64 (5th Cir. 1981) (affirming increase of judgment to reflect joint and several liability in amount four times greater than the jury awarded against each of four defendants); *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521, 527-28

awarded against any individual defendant. Thus the jury's individual assessment of \$100,000 compensatory damages against Nationwide Mortgage established to a certainty the minimum the jury intended to award. To suggest that the jury would have found less had it properly awarded damages jointly and severally is to suggest that the jury would have ignored its instructions and impermissibly compromised liability and damages.

(5th Cir. 1987) (affirming increase of jury award to offset reduction for comparative negligence improperly computed by jury). While different fact situations command different results, there is no split of authority on the underlying principles which guide the courts' determinations.

The decision below raises no novel points of law nor does it conflict with decisions of this Court or the other courts of appeals. Accordingly, the petition should be denied.

2. The court of appeals held that all the defendants were jointly and severally liable for the full amount of the \$100,000 judgment. Originally, however, the \$100,000 verdict was levied only against Nationwide Mortgage and its president. Mr. Boddie requested rehearing of the court of appeals' decision, asserting that the evidence was insufficient to support the \$100,000 verdict. Since no one had standing to raise this objection in the trial court, (judgment had been taken by default against Nationwide Mortgage and its president, who did not appear in deference to his Fifth Amendment rights), the court remanded the case to the district court for consideration of Mr. Boddie's challenge to the sufficiency of the evidence and possible *remittitur* or retrial on the issue of damages. Mr. Boddie's motion is currently pending in the district court.

The interlocutory nature of this petition renders it especially inappropriate for review at this time. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). If, as Mr. Boddie has requested, the district court grants a new trial on the issue of damages, his objections to the court of appeals' decision will become moot. Moreover, if the district court offers a *remittitur*, it may be that Mr. Boddie would no longer care to press his arguments. Simply, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Engine-*

men v. Bangor & Aroostook R. Co., 389 U.S. 327, 328 (1967). The petition does not present any question of law essential to further determination of the case. Nor does it present issues of law so extraordinary or fundamental that review would be warranted notwithstanding its interlocutory posture. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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August 5, 1988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RICHARD F. BODDIE,

Petitioner,

v.

DANIEL G. FAISON, *et al.*,

Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN
OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**REPLY BRIEF TO RESPONDENTS'
BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

Petitioner Richard F. Boddie respectfully submits his reply brief to respondents' brief in opposition to Mr. Boddie's petition for a writ of certiorari.

This reply addresses two cases which were first raised in respondents' brief in opposition. *G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945 (5th Cir. 1981); *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521 (5th Cir. 1987). Brief in Opposition, at 7. These decisions do not support the Court of Appeals decision in this case, which both violates the Seventh Amendment and conflicts with the other circuit court cases which have considered similarly inconsistent and erroneous verdicts, and provide no grounds to deny the petition for a writ of certiorari.

ARGUMENT

In the petition for a writ of certiorari, Mr. Boddie demonstrated that the decision below, which imposed joint and several liability on all defendants for the largest amount of damages awarded against any single defendant, is contrary to the result reached by all other federal courts of appeal faced with inconsistent special verdicts. Instead of ordering a new trial as required by the Seventh Amendment and this Court's prior decisions, the Court of Appeals modified the jury verdict by substituting its opinion on the proper measure of damages against Mr. Boddie for that of the jury. The Court's ruling thereby increased Mr. Boddie's liability for damages from \$5,000 to \$100,000.

In opposition, respondents assert that "while this situation has arisen only rarely, the decision below comports with the other courts' treatment of the issue," citing *G.A. Thompson* and *Geosearch*, *supra*. Brief in Opposition, at 7. Respondents' reliance on these two cases is misplaced; each case is easily distinguishable from the lower court's actions in this case.

1. In *G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 964 (5th Cir. 1981), a securities fraud case, the trial court instructed the jury that \$123,825.89 was the maximum recoverable by the plaintiff against the four defendants. Finding liability, the jury brought in a verdict of \$30,956.47 against each defendant—an amount which was exactly one quarter of the total allowable damages. *Id.* at 963. The trial court, recognizing that "the jury clearly misunderstood the court's instructions and divided the total damages by

four," then modified the judgment so that each defendant was jointly and severally liable for the full amount of the recoverable damages. *Id.*¹

G.A. Thompson is distinguishable from this case on numerous grounds. First, the jury's mistake in the amount of the damages it awarded against the individual defendants was obvious on the face of the verdict; the jury, by dividing the undisputed amount of total damages among the four defendants, had failed to follow the trial court's instructions. The court compared this mistake to a clerical error which a court can correct under Fed. R. Civ. P. 60(a). 636 F.2d at 963. Thus, by entering the joint and several judgment, the court was not reexamining the facts or interpreting what the jury intended.

In this case, in contrast, not only did the Court of Appeals find the jury's award internally inconsistent, but the Court explicitly acknowledged that it could not determine what the jury intended. App., 14a. This confusion which the Court found in the verdict required remand for a new trial and could not be resolved by the Court of Appeals rewriting the jury's verdict according to its own predilections.

Second, the court in *G.A. Thompson* recognized that even the smallest addition by a court to the jury-

¹ The trial court actually entered judgment for \$126,325.89, which included the maximum damages of \$123,825.89 plus an additional \$2,500 for a commission owed to the plaintiff. 636 F.2d at 964. The appellate court recognized that the trial court's *sua sponte* addition of the \$2,500 commission—which the jury had not included in its damage award—was an impermissible additur under *Dimick v. Schiedt*, 293 U.S. 474 (1935). *Id.* Accordingly, the court held that this addition to the judgment was error and affirmed the entry of the judgment jointly and severally for \$123,825.89. *Id.*

determined liability of a defendant is impermissible. The Fifth Circuit reversed the trial court's attempt to add \$2,500 to the verdict, when that sum had never been considered or awarded by the jury. 636 F.2d at 964. Here, the Court of Appeals selected the award of \$100,000, leveled by the jury only against other defendants who did not appear at trial, and applied it to Mr. Boddie, thereby increasing his liability by \$95,000, in violation of the Seventh Amendment.

2. The result in *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521 (5th Cir. 1987), is likewise unavailing to respondents. In *Geosearch*, a case involving insurance coverage for several oil wells, the parties stipulated to damages of \$397,695. *Id.* at 527. In answering special interrogatories, the jury found the plaintiff 45% negligent and awarded it \$218,732, or 55% of the total stipulated damages of \$397,695. *Id.* After expressing some doubt as to whether the award should be further reduced, since it is the court's duty, rather than that of the jury, to apply the reduction in damages called for under Texas comparative negligence law, the trial court ultimately entered judgment for \$218,732, the amount the jury assessed. *Id.* On appeal, the defendant argued that the award should have been further reduced by another 45%. *Id.*

The appellate court rejected that argument and affirmed the trial court's entry of the jury verdict. *Id.* at 528. The court held that since the damage figure was stipulated, it was clear that the jury had been led to believe that it should include the 45% comparative negligence reduction in its bottom line damage award. *Id.* In reaching the amount of its award, the jury had already deducted 45% from the damages

due the plaintiff and there was no need for further reduction by the court. *Id.* Thus, the Fifth Circuit held that the trial court did not err in entering the jury's verdict as issued. *Id.*

Geosearch has no application to the facts of this case. Unlike the key issue before the court in this case, there was no issue of joint and several liability involved in *Geosearch*. Furthermore, the trial court entered judgment for the amount actually awarded by the jury; there was no *increase* by the court in that figure. Thus, unlike this case, the appellate court in *Geosearch* made no modification in the jury's determination of the defendant's liability. Accordingly, like *G.A. Thompson*, *Geosearch* provides no support for respondents' opposition.

CONCLUSION

The Court of Appeals decision in this case contravenes the requirements of the Seventh Amendment and this Court's decision in *Dimick v. Schiedt*, 293 U.S. 474 (1935). The lower court's refusal to remand for a new trial in the face of an inconsistent and erroneous jury verdict and, instead, to increase Mr. Boddie's liability by \$95,000 is unprecedented. It is contrary to the result reached by all other circuit courts faced with similar circumstances. Thus, the Court of Appeals decision creates an unacceptable precedent which violates the right to trial by jury and which should be reviewed by this Court.

Accordingly, petitioner respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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